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No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., *Petitioner*,

v.

AVIALL SERVICES, INC., *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON THE MERITS

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Petitioner Cooper Industries, Inc. ("Cooper") respectfully submits this Reply to the Brief of Respondent Aviall Services, Inc. ("Aviall") and to the Briefs filed by various *Amici* supporting affirmance of the Fifth Circuit's ruling below.

Aviall and *Amici* spend an inordinate amount of time and energy discussing policy considerations that purportedly favor voluntary over compelled cleanups of hazardous waste sites, but pay scant attention to the precise question before this Court – *i.e.*, whether a private party who has not been subject to a civil action under Section 106 or Section 107(a) may seek contribution under Section 113(f)(1) of CERCLA. The Fifth Circuit's affirmative response to this question, they argue, should be upheld to facilitate enforcement of CERCLA, to better meet corporate expectations, and to further a policy that, if not at the heart of CERCLA, purportedly should be. Ascribing such lofty policy aspirations to a statute narrowly tailored to remedy a

particular problem in a most traditional way disserves not only the text and structure of Section 113(f)(1), but also congressional intent. While Cooper's opening brief answers much of what Respondent and *Amici* argue, Petitioner adds the following discussion in further reply to certain points made in the opposition briefs.

A. The Plain Language Of Section 113(f)(1) Permits Only A Limited Federal Right Of Contribution

Congress provided in Section 113(f)(1) that "[a]ny person may seek contribution" from other liable or potentially responsible persons ("PRPs") "during or following any civil action" brought under CERCLA Sections 106 or 107(a). 42 U.S.C. § 9613(f)(1). Whether the term "may" is understood in its more permissive sense, as Respondent and some *Amici* argue,[1] or as a more emphatic command, as Petitioner maintains,[2] Congress was explicit in its limitation of Section 113(f)(1) contribution rights to parties against whom a Section 106 or Section 107(a) civil action is pending or has been fully adjudicated. *See* Pet. Br. at 13-21.

As previously discussed (*id.*), the language of Section 113(f)(1)'s enabling clause and the provision's overall structure do not comfortably accommodate any other reading. Although the Fifth Circuit relies on the provision's savings

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[1] *See* Brief of Respondent ("Resp. Br.") at 17-19; Brief of *Amici Curiae* Conoco Phillips Co. *et al.* ("Conoco Br.") at 7-8.

[2] *See* Petitioner's Brief on Merits ("Pet. Br.") at 13-14. Petitioner does not understand the statute's use of "may" to compel a contribution action by a party subject to a Section 106 or Section 107(a) suit or judgment, but only to authorize such an action. It is not that a PRP *must* seek contribution in such circumstances, but that it *may* do so.

clause as authorization to ignore the "during or following" prerequisite that Congress included in Section 113(f)(1)'s operative sentence, the savings clause, by its own terms, creates no independent right of action. It simply ensures that all rights of contribution that may be available to a person in the absence of a pending or adjudicated Section 106 or 107(a) civil action *shall not be diminished* by the federal right of contribution codified in the provision's lead sentence. *See id.* at 19-20.

Petitioner is aware of no rights of contribution that fall within the saving clause's coverage other than those existing under State law (*see id.* at 18 n.11), and the federal contribution right Congress created in Section 113(f)(3)(B) upon a party's settlement of its cleanup obligations with state or federal enforcement authorities (*see id.* at 19). Nor have Respondent or *Amici* identified any others.[3] To be sure, pre-SARA, some lower federal courts had held that parties subject to a Section 107(a) enforcement action by the federal government had an implied right of action for contribution against other PRPs. *See* Pet. Br. at 10 n.5. Yet, as the legislative history makes unmistakably clear (*id.* at 22-25), Congress chose to make this implied right explicit *in the first sentence* of Section 113(f)(1).[4] Nothing in the legislative

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[3] Although several *Amici* offer the unsurprising observation that different State laws treat contribution rights differently, including some which afford no right of contribution for hazardous waste cleanups, *see* Conoco Br. 9-10; Brief of *Amici Curiae* Superfund Settlements Project et al. ("Superfund Settlements Br.") at 25-26, and Respondent seems to suggest that Section 113(f)(1)'s last sentence may not have even been intended to save State law rights of contribution (Resp. Br. at 20), they have offered nothing from the legislative history or other sources to dispute that, by using the words "[n]othing . . . shall diminish," Congress intended anything other than their plain meaning – *i.e.*, all that exists elsewhere shall be preserved.

[4] Respondent and *Amici* seek to expand Congress' stated intent for enacting Section 113(f)(1) – *i.e.*, to "clarif[y] and confirm[ ] the right of a

history suggests that, by adding a savings clause as the provision's last sentence, Congress intended to undo that handiwork.[5]

Respondent contends that this reading of Section 113(f)(1) denies Aviall all recourse against Cooper for any funds that Aviall may have voluntarily expended. Resp. Br. at 8. That is a vast overstatement of the statute's operative effect. Aviall has asserted contribution claims under Texas law, and, specifically by virtue of Section 113(f)(1)'s savings clause, Aviall certainly can pursue Cooper in State court on those State law claims. *See* Pet. Br. at 19 n.12. To be sure, Aviall will not have a federal contribution claim, either under

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person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties" (H.R. Rep. No. 99-253(I), at 79, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2861) – by inviting this Court to regard all pre-SARA *cost recovery suits* as actions "in the nature of contribution," as the Fifth Circuit did. *See* Resp. Br. at 22; Brief of Atlantic Richfield *et al.* as *Amici Curiae* ("Atlantic Richfield Br.") at 19. The pre-SARA right of contribution, however, was uniformly understood in its federal common law sense as permitting contribution actions to allocate shared liability among joint tortfeasors. *See* Pet. Br. at 10 n.5. It is abundantly clear that Congress understood "CERCLA's once-implied right of contribution" (Resp. Br. at 21) in these terms, and codified only that previously implied right in Section 113(f)(1)'s first sentence. *See* Pet. Br. at 24 n.18. Whatever implications this legislative choice may have had for Section 107(a) *cost recovery actions* between and among PRPs (*id.*), as opposed to actions for *contribution*, is, of course, not presently before the Court and thus of no relevance to the present case.

[5] Respondent argues that the last sentence of Section 113(f)(1) should be understood to act "as an express reservation of CERCLA's once-implied right of contribution . . ." (Resp. Br. at 21). "CERCLA's once-implied right of contribution" was inextricably tied, however, to the presence of a Section 107 enforcement action (*id.* at 20-21), and thus the explicit language of Section 113(f)(1)'s saving clause – authorizing only contribution actions "in the *absence* of a [Section 107] civil action" – emphatically eliminates that possibility. *See also* discussion at p. 9, *infra*.

Section 113(f)(1) or otherwise.[6] But that leaves Aviall in the same position it would have been in before SARA's enactment. Just as Aviall, pre-SARA, would not have had a right of contribution by implication, because that implied right arose only in response to an enforcement action under Section 107(a) (*see* Pet. Br. at 23-24 and n.18), so too must Aviall's present claim for contribution fail, because it is not

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[6] Respondent (Resp. Br. at 20-21), and at least one of the *Amici* (Brief of Lockheed Martin Corp. as *Amicus Curiae* ("Lockheed Br.") at 8-12), assert that Aviall should at least be allowed to pursue some sort of Section 107(a)(4)(B) "blended action" that would incorporate the Section 113(f)(1) remedy of contribution. Whether any such action could even be maintained by a PRP such as Aviall under Section 107(a)(4)(B) seems dubious. Every federal court of appeals to have considered this discrete cost recovery issue, including the Fifth Circuit, has ruled that Section 107(a) is unavailable for cost recoupment purposes to persons responsible for any part of the contaminated condition (such as Aviall). *See* Pet. Br. at 35 n.29 (citing cases).

In any event, the instant case concerns only the scope and nature of the contribution right found in Section 113(f)(1), and raises no "contribution issue" under Section 107(a). Indeed, Aviall amended its original complaint to remove a Section 107(a)(4)(B) claim for cost recovery (*see* Joint Appendix ("JA") 27A), and, in a subsequent amendment to its complaint, failed to reallege the claim (JA 48A). Upon inquiry by the district court, Aviall's counsel explained that Aviall would not, and indeed could not, bring a Section 107 claim because it had participated in the pollution of the facilities. *See* JA 92A-93A. Both courts below observed that Aviall's Section 107(a)(4)(B) cost recovery claim had been "dropped" (Petition for a Writ of Certiorari Appendix 94a, 49a), and Aviall specifically advised this Court that issues concerning "the relationship between sections 113(f) and 107(a)(4)(B)," among others, "were neither raised, briefed, nor decided [below] in this case." Brief in Opposition to the Petition for a Writ of Certiorari at 10. Accordingly, Respondent's Section 107(a) "blended action," such as it is, neither can nor should be addressed in any fashion by the Court. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994); *see also Household Credit Servs., Inc. v. Pfennig*, 124 S. Ct. 1741, 1747 n.3 (2004) (citing *County of Kent*).

pursued "during or following [a Section 106 or 107(a)] civil action."[7] The language of Section 113(f)(1) is clear.[8]

B. Section 113(f)(1)'s Limited Right of Contribution Well Serves CERCLA's Stated and Intended Purposes

Where, as here, the provision under scrutiny is neither ambiguous nor complicated, it is unnecessary to go beyond the statutory language to discern its intended meaning. *See, Lamie v. United States Tr.*, 124 S. Ct. 1023, 1030 (2004); *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 124 S. Ct. 1330, 1341 (2004); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Respondent and

[7] It is not altogether clear why Respondent and certain *Amici* have attempted to introduce here a discussion regarding "administrative cleanup orders." *See* Resp. Br. at 27; Atlantic Richfield Br. at 14-16; Superfund Settlements Br. at 20-23. Undeniably, Aviall did not undertake its cleanup activities pursuant to such an order. *See* Pet. Br. at 2. Moreover, Section 113(f)(1) refers only to "civil actions." If an issue should later arise about whether Congress intended "civil action," as used in Section 113(f)(1), to include administrative remediation orders, that would be the appropriate occasion to entertain the question, if at all. *But see* Brief of the United States as *Amicus Curiae* at 22-23 n.11. It certainly is not presented here.

[8] We have heretofore discussed how an examination of the statute's related provisions – particularly the one establishing the applicable limitation period for contribution actions brought in response to an adjudication or settlement (*see* Section 113(g)(3), 42 U.S.C. 9613(g)(3)) – further reinforces Petitioner's understanding of the limited nature of Section 113(f)(1)'s contribution right. *See* Pet. Br. 31-33. While Respondent and some *Amici* urge that the applicable statute of limitation's provision can be wholly disregarded for present purposes (Resp. Br. at 24-25; Lockheed Br. at 22-23; Brief of the States of New York, *et al.* as *Amici Curiae* in Support of Respondent ("States' Br.") at 4-9), they give no good reason for doing so, and every canon of statutory construction argues otherwise. *See* Pet. Br. at 32.

Amici nonetheless urge an expansive policy examination on the premise that confining the federal right of contribution under Section 113(f)(1) to suits brought "during or following [Section 106 or Section 107] civil actions" would undermine an overarching policy to encourage the *voluntary cleanup* of hazardous waste sites. *See* Resp. Br. at 23-25; Lockheed Br. at 24-30; Superfund Settlements Br. at 24-25; Conoco Br. 16-27; Atlantic Richfield Br. 10-14.

Petitioner, however, can discern no indication that CERCLA was enacted to promote strictly voluntary remediation. *See* Pet. Br. at 36-40. Neither Respondents nor *Amici* provide anything to suggest that their search through the legislative history has been any more productive. Rather, it was the very lack of voluntary private remediation that prompted Congress to enact CERCLA and immediately give the federal government "'the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal.'" *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).[9] CERCLA's text readily illustrates that its various provisions were crafted to provide the government with badly needed enforcement authority to remediate disturbingly contaminated sites, and, as necessary, to compel private parties to cooperate in such efforts. *See, e.g.*, 42 U.S.C. § 9604(a) (federal removal of hazardous substances); *Id.* § 9604(e) (federal demand for information relevant to

[9] *See also Witco Corp. v. Beekhuis*, 38 F.3d 682, 688 (3d Cir. 1994); *Sidney S. Anst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (11th Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 167 n.8 (4th Cir. 1988).

hazardous substance contamination); *Id.* § 9606(a) (administrative remediation orders); *Id.* § 9606(b) ($25,000 daily fine for non-compliance with federal order); *Id.* § 9607(a)(4)(A) (government or Indian tribe cost recovery actions); *Id.* § 9607(e) (barring agreements to protect PRPs from cost recovery claims); *Id.* § 9607(f) (federal liability for natural resources destruction).

The statute's legislative history affirms that this was Congress' principal focus. Congressman Florio, in describing the legislation, stated: "Both Houses addressed the key concerns which had to be dealt with in hazardous substance legislation" by ensuring that "the Government has been given the necessary authority to respond to hazardous substance releases." 126 CONG. REC. 31,964 (Dec. 3, 1980). Similarly, Senator Leahy remarked that CERCLA was designed to ensure that "the Federal Government's ability to respond to incidents involving hazardous and highly toxic substances will be greatly strengthened." *Id.* at 30,971 (Nov. 24, 1980); *see also id.* (Senator Chafee observing that CERCLA was intended to provide the government with "a tool for holding liable those who are responsible for these costs").

As already discussed (Pet. Br. at 22-23), in the aftermath of CERCLA, the concern that the joint and several enforcement mechanisms available to the federal government might impose uneven liability on targeted PRPs prompted some federal courts to fashion an implied right of contribution under Section 107(a). *See* Pet. Br. at 10 n.5 (citing cases); *id.* at 23-25. Notably, this implied right was not seen as furthering voluntary cleanups of the sort performed by Aviall in the instant case, but rather as permitting those PRPs forced to incur uneven liability under a government Section 107(a) enforcement action to seek

proportionate recovery from other PRPs.[10] *See Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 30 (E.D. Mo. 1985); *United States v. Ward*, No. 83-63-CIV-5, 1984 U.S. Dist. LEXIS 16774, at *11-*12 (D.N.C. May 11, 1984); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 995 n.8 (D.S.C. 1984).

We have already shown that Congress intended Section 113(f)(1) to codify this implied right of action. *See* Pet. Br. at 22-25. Certainly, at the time of SARA's passage, the EPA understood the contribution action being proposed as a federal right exercisable only by those facing or saddled with joint and several liability in a government enforcement action, not as a vehicle for use by PRPs (like Aviall) who chose voluntarily to clean up their contaminated facilities. *See, e.g.*, EPA Interim CERCLA Settlement Policy, at 13 (OSWER Dir. No. 9835.0, dated Dec. 4, 1985), *published in* 50 Fed. Reg. 5034, 5038 (Feb. 5, 1985) ("Contribution among responsible parties is based on the principle that a jointly and severally liable party *who has paid all or a portion of a judgment or settlement* may be entitled to reimbursement from other jointly or severally liable parties") (emphasis added); *see also* Atlantic Richfield Br. at 8-9 (citing H. Habicht testimony that fairness of joint and several liability scheme depends upon the clear availability of contribution).[11] Again, the recognized concern was over the

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[10] As originally enacted, CERCLA provided for no statutory right of contribution whatsoever. Thus, the suggestion by Respondent and *Amici* that Congress, when enacting CERCLA, regarded a federal right of contribution as an important incentive to promote voluntary cleanups seems highly implausible. *See* n.11, *infra*; *see also* Pet. Br. at 10, 37. Congress' subsequent codification of the implied contribution right in Section 113(f)(1) certainly contains no such implication. *See* Pet. Br. at 37.

[11] Respondent and some *Amici* point to policy statements made by EPA between CERCLA's enactment and the SARA amendments as reflecting an agency policy to promote voluntary cleanups. *See* Resp. Br. at 16, 35;

potentially disproportionate imposition of CERCLA liability among those targeted by the federal government in a Section 106 or Section 107(a) suit. The SARA amendments, and specifically Section 113(f)(1), were intended to and, when properly read, do in fact alleviate that concern. As stated by the Senate Committee on Environment and Public Works upon reporting out the bill that became law, "when joint and several liability *is imposed* under Section 106 or 107 of the Act, *a concomitant right of contribution* exists under CERCLA." *See* H.R. Rep. 99-253(I), at 78-79, *reprinted* in 1986 U.S.C.C.A.N. at 2861 (emphasis added) (citing with approval *Ward*, 1984 U.S. Dist. LEXIS 16774 and *South Carolina Recycling & Disposal Inc.*, 653 F. Supp. 984). *See also* Pet. Br. at 16 n.10.

This means, of course, that Section 113(f)(1) is not the general environmental tort statute that Respondent and a number of the *Amici* would portray it to be. *See County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1517 (10th Cir. 1991) (CERCLA was not designed to "'make injured parties whole or to [create] a general vehicle for toxic tort actions.'") (quoting *Artesian Water Co. v. Gov't of New Castle County*, 659 F. Supp. 1269, 1299-1300 (D. Del. 1987), *aff'd*, 851

Atlantic Richfield Br. at 8-9; Conoco Br. at 18-19. While EPA may well have perceived the encouragement of voluntary action to be in its own enforcement interest, its policy statements reveal that EPA viewed "negotiated settlements" as the best vehicle to encourage voluntary cleanups and thus reduce litigation. EPA Interim CERCLA Settlement Policy, at 3-4. EPA nowhere indicates that it regarded a *right of contribution* as an incentive for voluntary cleanups – except perhaps to the extent that offering PRPs protection from contribution actions by others could encourage them to enter into negotiated settlements. *Id.* at 4. Notably, this focus on the incentives to be derived from settlements was not lost on Congress and found its way into the SARA amendments. *See* 42 U.S.C. § 9613(f)(3)(B) (right of settling party to seek contribution); *id.* § 9613(f)(2) (protection of settling party from contribution actions by other PRPs). *See also* Pet. Br. at 33-35.

F.2d 643 (3d Cir. 1988)). Far from preempting the field (*see* Pet. Br. at 38-39), the limited federal right of contribution occupies only the precise gap Congress sought to fill to ensure that the government's use of its arsenal of CERCLA enforcement tools would not foreclose those PRPs who are targeted from requiring other responsible parties to pay their share.[12]

While Aviall thus derives no direct benefit from Section 113(f)(1), Aviall does enjoy an indirect benefit insofar as the statute's savings clause protects Aviall's State law claims from federal preemption. *See* Pet. Br. at 38-39. This assurance reflects Congress' chosen balance between the federal government and the States. *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1047-48 (2d Cir. 1985) (Congress and EPA envisioned joint federal and state efforts to clean up sites and to pursue costs from polluters). Congress recently readdressed that balance in the Brownfields Revitalization and Environmental Restoration

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[12] *Amicus* Lockheed Martin asserts that Petitioner's narrow reading of Section 113(f)(1) could result in "an extraordinary windfall" for the United States. *See* Lockheed Br. at 28. Where, Lockheed argues, a federal agency contributed to the contamination, the United States could, in theory, refrain from initiating a Section 106 or 107(a) suit so as to deny other responsible persons the opportunity to seek contribution against the contributing agency. No one suggests, however, that the United States has failed to pursue CERCLA suits on behalf of the EPA where a government agency contributed to the contaminated condition. Moreover, judicially approved settlements, as reflected in filed consent decrees, can be readily used to obtain an allocation of cleanup costs among responsible parties, including the United States. *See* 42 U.S.C. § 9613(f)(3)(B). Finally, Congress has specifically enacted separate legislation requiring federal agencies to address federally-owned properties that are contaminated, *see, e.g.*, 10 U.S.C. § 2701, including former Department of Defense facilities (*see id.* § 2701(c)(1)(B)). Of course, should Lockheed's stated concern about a possible government "windfall" ever materialize, it would be for Congress then – not this Court, now – to give the appropriate response.

Act of 2001, Pub. L. No. 107-118, 115 Stat. 2360 (2002) ("Brownfields Act"), by delegating primary responsibility in identifying and enforcing remediation at designated "brownfield" sites to States and local authorities. *See* Pet Br. at 38; *see also* States' Br. at 1-2 (citing 42 U.S.C. § 9604(c)(2)-(3), *id.* § 9607(a)(4)(A)); *see also id.* § 9607(o)-(q).

The suggestion of Respondent and *Amici* that Section 113(f)(1)'s federal right of contribution disserves this congressional scheme, if exercisable by PRPs only "during or following a [Section 106 or Section 107(a)] civil action," fails to appreciate the very purpose behind the SARA amendments. Through Section 113(f)(1), Congress addressed the specific problem of disproportionate liability by PRPs *subject to* a government action under Section 106 or Section 107(a). It did so in a manner carefully tailored *not to encroach* on contribution rights that responsible persons could pursue under State law. The language, structure and history of Section 113(f)(1) not only support the limited contribution right Petitioner urges, but also compel rejection of the broader reading of the Fifth Circuit.[13] *See* Pet. Br. at 33-34. Reversal of the court of appeals' *en banc* decision is therefore required.

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[13] Respondent and a number of *Amici* argue that Petitioner's more narrow reading of the statute is inconsistent with earlier statements by the United States as to how Section 113(f)(1) should be interpreted and understood, notwithstanding the United States' *amicus* brief supporting Petitioner in this case. Any inconsistencies, however, like differing views on the statute expressed by federal judges (*see* Petition for a Writ of Certiorari at 26-29), serve only to highlight why the case is now before the Court for plenary review. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (agency change in position is not invalidating). The issue here turns not on what others previously may have said about the statute, but on what Section 113(f)(1) itself says and how Congress intended the language to be read. That alone is the question for this Court to decide.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and Aviall's case should be dismissed.

Respectfully submitted.

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